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PEMUNGUT DUTI SETEM v. LEE KOY ENG & A REVIEW APPLICATION

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
HASNAH MOHAMMED HASHIM FCJ
B MARY LIM FCJ
[CIVIL APPEAL NO: 01(f)-9-07-2021(B)
& REVIEW APPLICATION NO: 08(R)-2-02-2022(B)]
7 JULY 2022

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Abstract – *An appeal under s. 39 of the Stamp Act 1949 is invoked by the person paying the stamp duty and not by the Collector of Stamp Duty. Although the notice of appeal is lodged at the High Court and categorised as an appeal, s. 39 provides the appealing party the right to require the Collector to state and sign a case, setting forth the question upon which the opinion of the High Court is required and the decision made by the Collector. The High Court is not required to hear the evidence and make findings on factual evidence heard; its sole function in a case stated is to answer the question(s) posed.*

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CIVIL PROCEDURE: *Appeal – Case stated – Collector of Stamp Duty ('Collector') imposed ad valorem stamp duty on instruments of transfer – Collector dismissed review – Appeal to High Court – Function of High Court in case stated – Whether High Court required to hear evidence and make findings on factual evidence – Whether only to answer question(s) posed – Stamp Act 1949, ss. 36(1), 38A & 39*

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LAND LAW: *Transfer – Instruments – Instruments of transfer required to be executed in order to affect transfer of properties owned by deceased – Collector of Stamp Duty ('Collector') imposed ad valorem stamp duty on instruments of transfer – Collector dismissed review – Case stated – High Court allowed appeal and decision affirmed by Court of Appeal – Collector granted leave to appeal at Federal Court – Whether Federal Court seized with jurisdiction – Stamp Act 1949, ss. 36(1), 38A & 39*

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The respondent's husband ('deceased') died intestate, leaving behind three beneficiaries, namely the respondent and their two children. The two children agreed to distribute the properties, owned by the deceased, solely to the respondent. A court order was then issued to vest these properties on the respondent. Pursuant to the vesting order, the instruments of transfer, Forms 14A under the National Land Code, were required to be executed in order to affect the transfer of the properties to the respondent. By virtue of s. 36(1) of the Stamp Act 1949 ('Act'), the appellant-imposed *ad valorem* stamp duty on the instruments of transfer, assessing the amount payable under item 66(c) in the First Schedule to the Act, as the transfer was treated as a 'release or renunciation by way of gift'. The respondent disagreed and sought a review under s. 38A of the Act, claiming that the transfer ought to

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be assessed under item 32(i) instead where the amount was RM10. The appellant dismissed the review, prompting the respondent to file an appeal at the High Court. Meanwhile, as required by s. 39 of the Act, the respondent paid the stamp duty as assessed by the appellant. The High Court allowed the respondent's appeal and the decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal. The respondent filed a motion to set aside the leave granted, citing lack of jurisdiction as the main ground.

Held (dismissing application; affirming decision in granting leave questions)
Per Mary Lim FCJ delivering the judgment of the court:

(1) The matter of jurisdiction is not properly the subject of *res judicata*. If the court has no jurisdiction, it has no jurisdiction and, despite the grant of leave, the issue of jurisdiction always remain open for the court hearing the substantive appeal, to relook at the issue. (para 8)

(2) Any appeal under s. 39 of the Act is always invoked by the person paying the stamp duty and not by the Collector of Stamp Duty ('Collector'); an appeal by the Collector against himself could not be envisaged. Although the notice of appeal is lodged at the High Court and categorised as an appeal, s. 39 provides the appealing party the right to require the Collector to state and sign a case, setting forth the question upon which the opinion of the High Court was required and the decision made by the Collector. Where that right is invoked, the Collector does precisely what is required under s. 39. When the case is ready, a copy is sent to the appealing party and the case may then be set down for hearing by the High Court. These steps were followed in this appeal. (para 11)

(3) As a case stated, the High Court was not required to hear evidence and make findings on factual evidence heard. The High Court's sole function in a case stated is to answer the question(s) posed. That being so, the case stated from the Collector, under s. 39 of the Act, ought to have been filed at the High Court by way of originating summons. Unfortunately, it was not filed, lending to the state of confusion insofar as the matter of what jurisdiction of the High Court had been invoked when dealing with the question of law posed in the case stated. Although the case stated was filed as an appeal, this did not alter the true nature of proceedings before the High Court. (paras 12 & 28)

(4) The case stated in this appeal was appealable to the court and the court was vested with the jurisdiction to hear the appeal after leave was granted on the questions posed. (paras 8 & 40)

A ***Bahasa Melayu*** *Headnotes*

Suami responden ('si mati') meninggal dunia tidak berwasiat, meninggalkan tiga orang benefisiari iaitu reponden dan dua orang anak mereka. Kedua-dua anak tersebut bersetuju untuk mengagihkan hartanah, yang dimiliki si mati, kepada responden. Satu perintah mahkamah seterusnya dikeluarkan untuk
B meletak hak hartanah-hartanah ini pada responden. Lanjutan perintah letak hak tersebut, instrumen-instrumen pindah milik, iaitu Borang-borang 14A bawah Kanun Tanah Negara, dikehendaki dimeterai demi menguatkuasakan pindah milik hartanah-hartanah tersebut pada responden. Bawah s. 36(1) Akta Setem 1949 ('Akta'), perayu mengenakan duti setem *ad valorem* pada
C instrumen-instrumen pindah pilik, mentaksir jumlah yang perlu dibayar bawah item 66(c) Jadual Pertama Akta, kerana pindah milik dianggap sebagai 'pelepasan atau penolakan secara hadiah'. Responden tidak bersetuju dan memohon semakan bawah s. 38A Akta, menghujahkan bahawa pindah milik seharusnya ditaksir bawah item 32(i) yang jumlahnya RM10. Perayu
D menolak semakan dan ini mendorong responden memfailkan rayuan di Mahkamah Tinggi. Sementara itu, seperti yang dikehendaki oleh s. 39 Akta, responden membayar duti setem yang ditaksir oleh perayu. Mahkamah Tinggi membenarkan rayuan responden dan keputusan ini disahkan oleh Mahkamah Rayuan. Perayu diberi kebenaran merayu. Responden
E memfailkan usul mengetepikan kebenaran yang diberi, memetik ketiadaan bidang kuasa sebagai alasan utama.

Diputuskan (menolak permohonan; mengesahkan keputusan memberi kebenaran untuk soalan-soalan)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

F **(1)** Hal perkara bidang kuasa bukan hal perkara khusus *res judicata*. Jika mahkamah tidak mempunyai bidang kuasa, mahkamah tetap tidak mempunyai bidang kuasa dan, jika pun kebenaran diberi, isu bidang kuasa kekal terbuka untuk mahkamah yang mendengar rayuan substantif, melihat semula isu tersebut.

G **(2)** Apa-apa rayuan bawah s. 39 Akta sentiasa dibangkitkan oleh orang yang membayar duti setem dan bukan oleh Pemungut Duti Setem ('Pemungut'); rayuan Pemungut terhadap dirinya tidak boleh dibayangkan. Walaupun notis rayuan difailkan di Mahkamah Tinggi dan tergolong sebagai rayuan, s. 39 memperuntukkan pihak yang merayu
H dengan hak mengkehendaki agar Pemungut menyatakan dan menandatangani kes, mengajukan soalan yang memerlukan pendapat Mahkamah Tinggi dan keputusan dibuat oleh Pemungut. Apabila hak ini dibangkitkan, Pemungut melakukan apa-apa yang dikehendaki bawah s. 39. Apabila kes sedia, satu salinan diserahkan pada pihak yang
I merayu dan kes tersebut boleh bermula untuk dibicarakan oleh Mahkamah Tinggi. Langkah-langkah ini dituruti dalam rayuan ini.

(3) Sebagai kes yang dinyatakan, Mahkamah Tinggi tidak perlu mendengar keterangan dan membuat dapatan-dapatan tentang keterangan-keterangan yang didengar. Fungsi utama Mahkamah Tinggi dalam kes yang dinyatakan ialah mendengar soalan-soalan yang diutarakan. Oleh itu, kes yang dinyatakan oleh Pemungut, bawah s. 39 Akta, sepatutnya difailkan di Mahkamah Tinggi melalui saman pemula. Malangnya, ini tidak difailkan, menyebabkan kekeliruan setakat hal perkara apakah bidang kuasa Mahkamah Tinggi yang dibangkitkan dalam menangani soalan undang-undang yang diketengahkan dalam kes yang dinyatakan. Walaupun kes yang dinyatakan difailkan sebagai rayuan, ini tidak mengubah sifat sebenar prosiding di Mahkamah Tinggi.

(4) Kes yang dinyatakan dalam rayuan ini boleh dirayu pada mahkamah dan mahkamah mempunyai bidang kuasa mendengar rayuan selepas kebenaran diberi untuk soalan-soalan yang diajukan.

Case(s) referred to:

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Capital Insurance Bhd v. Asiah Abdul Manap & Anor [2000] 4 CLJ 1 FC ***(refd)***

Cheok Doris v. Commissioner Of Stamp Duties [2010] SGCA 28 ***(refd)***

Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Collector Of Stamp Duties v. Ng Fah In & Ors [1981] 1 LNS 107 FC ***(refd)***

Committee of Direction of Fruit Marketing v. Australian Postal Commission [1979] 25 ALR 221 ***(refd)***

Director-General Of Inland Revenue v. Rakyat Berjaya Sdn Bhd [1984] 1 CLJ 219; [1984] 1 CLJ (Rep) 108 FC ***(refd)***

Edwards (Inspector Of Taxes) v. Bairstow [1956] AC 14 ***(refd)***

Government Of India v. Petrocon India Ltd [2016] 6 CLJ 321 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No: 08-31-1999) (Unreported) ***(refd)***

Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(refd)***

Lee Yee Sheng & Anor v. Commissioner of Inland Revenue [2008] 2 HKC 436 ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2019] 8 CLJ 433 FC ***(refd)***

Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar Of Trade Marks (Interested Party) [2018] 6 CLJ 167 FC ***(refd)***

R v. Rigby (1956) 100 CLR 146 ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2003] 1 CLJ 61 FC ***(refd)***

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***

Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd [2013] 2 CLJ 910 FC ***(refd)***

UN Finance Bhd v. Director-General Of Inland Revenue [1975] 1 LNS 186 FC ***(refd)***

Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party) [2011] 7 CLJ 401 FC ***(refd)***

Legislation referred to:
Co-operative Societies Act 1993, s. 83(7)
Courts of Judicature Act 1964, ss. 23, 24, 27, 28, 29, 96(a)
Federal Constitution, art. 121
Income Tax Act 1967, Schedule 5
Land Ordinance (Sabah) (Cap 68), s. 41
National Land Code, Form 14A, First Schedule
Rules of Court 2012, O. 5, O. 55A r. 1
Stamp Act 1949, ss. 36(1), 38A, 39(1), (3), (4), First Schedule
Trade Marks Act 1976, s. 28

Administrative Appeals Tribunal Act 1975 [Aust], s. 44

For the appellant - Hazlina Hussain, Ridzuan Othman & Mohamad Asyraf Zakaria; LHDN
For the respondent - Thayalan Muniandy, Theomus Foo, Abigail Kung & Teaw Zhen Yang; M/s Chambers of Jason Chew

Reported by Najib Tamby

JUDGMENT

Mary Lim FCJ:

[1] On 28 June 2021, the appellant was granted leave to appeal after the Federal Court was satisfied that the three questions posed met the threshold requirements set out in s. 96(a) of the Courts of Judicature Act 1964 (Act 91). On 18 October 2021, a separate panel of the Federal Court in granting leave to appeal to the same appellant before us in respect of *Pemungut Duti Setem, UTC Johor Bahru v. Ku Ek Mei* (Civil Application No: 08(f)-247-09-2020 (J)) (second appeal) ordered that that appeal be heard together with the present appeal. In that appeal, the following threshold question was allowed together with several other questions:

> Whether the High Court in hearing the appeal by way of case stated pursuant to section 39 of the Stamp Duty Act 1949 is exercising its original or appellate jurisdiction.

[2] When the two appeals came up for hearing before us, the second appeal was withdrawn. Meanwhile, the respondent in the present appeal filed a motion 08(R)-2-02-2022(B) pursuant to r. 137, praying for a setting aside of the leave granted on 28 June 2021, citing lack of jurisdiction as the main ground. The appellant agreed that the issue of jurisdiction be dealt with as a preliminary issue in the main appeal. We then proceeded to hear the review application and adjourned the main appeal pending the outcome of the decision in this application.

[3] After hearing extensive submissions from both counsels in addition to the written submissions filed, we adjourned to allow us time to deliberate on what we see as a very important issue, with extensive ramifications. Having deliberated at length, this is our decision on the preliminary issue of jurisdiction.

Some Factual Background

[4] The respondent's claim started when the appellant-imposed *ad valorem* stamp duty on Forms 14A executed by the respondent together with one Mr Tan, as co-administrators of the estate of Mr Tan Kok Lee @ Tan Chin Chai who died intestate on 17 May 2018 leaving three beneficiaries, namely the respondent who is the deceased's widow and their two children. The deceased owned five properties which under a deed of family arrangement dated 2 October 2018, the two children agreed to *inter alia* distribute those five properties solely to their mother. A court order dated 20 December 2018 was issued to vest those properties on the respondent. Pursuant to the vesting order, the co-administrators were required to execute instruments of transfer, Forms 14A under the National Land Code to affect the transfer of the five properties to the respondent.

[5] By virtue of s. 36(1) of the Stamp Act 1949 (Act 378), the appellant-imposed *ad valorem* stamp duty on those instruments of transfer, assessing the amount payable under item 66(c) in the First Schedule to Act 378 as the transfer was treated as a 'release or renunciation by way of gift'. The respondent disagreed and asked for a review under s. 38A of the Act 378, claiming that the transfer should be assessed under item 32(i) where the amount is RM10 and not under item 66(c).

[6] The review was dismissed by the appellant. The respondent then invoked her right of appeal under s. 39(1) and filed two separate appeals; which appeals were later consolidated as one. Meanwhile, as required by s. 39, the respondent paid the stamp duty as assessed by the appellant.

[7] On 20 December 2019, the High Court allowed the appeal. The respondent's appeal to the Court of Appeal was later dismissed. On 28 June 2021, the Federal Court granted leave to appeal on three questions of law posed by the appellant.

Appealability Of An Appeal By Way Of Case Stated Under S. 39 Of The Stamp Act 1949

[8] We understand at the time of the application for leave to appeal, the matter of appealability of this appeal was raised by learned counsel for the respondent as a preliminary objection in opposition to the application for leave under s. 96(a) of the Courts of Judicature Act 1964 (Act 91). After hearing submissions, that preliminary issue was dismissed. In opposition to the respondent's application for review of that grant of leave, the appellant has raised *inter alia* the matter of *res judicata*. We want to place on record that

the matter of jurisdiction is not properly the subject of *res judicata*. If the court has no jurisdiction, it has no jurisdiction and despite the grant of leave, the issue of jurisdiction always remain open for the court hearing the substantive appeal, to relook at the issue. There are more than enough authorities to that effect – see for instance, *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; *Capital Insurance Bhd v. Asiah Abdul Manap & Anor* [2000] 4 CLJ 1; [2000] 4 MLJ 65; *Raphael Pura v. Insas Bhd & Anor* [2003] 1 CLJ 61; [2003] 1 MLJ 513; *Government Of India v. Petrocon India Ltd* [2016] 6 CLJ 321; [2016] 3 MLJ 435; *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2019] 8 CLJ 433; [2019] MLJU 742; *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153.

[9] Consequently, we have ample jurisdiction to hear this preliminary issue.

[10] In order to address the matter of appealability of this appeal, we need to look back at how the matter originated. It is there then that we can better appreciate what jurisdiction of the High Court was invoked at the material time. We go back to s. 39 of Act 378 (as amended in 2022 *vide* Finance Act 2021 (Act 833)):

> **39. Appeal to High Court**
>
> (1) Any person who is dissatisfied with the decision of the Collector under subsection 38A(5) may, within twenty-one days after the person is notified in writing of that decision and upon payment of duty in conformity therewith, appeal against the decision to the High Court by filing a notice of appeal with the High Court and may for that purpose require the Collector to state and sign a case, setting forth the question upon which is opinion was required, and the decision made by him.
>
> (1A) Where a notice of appeal has been filed under subsection (1), the notice shall be served on the Collector within the time stipulated for the filing of the notice of appeal.
>
> (2) The Collector shall thereupon state and sign a case and deliver the same to the person by whom it is required, and the case may, within seven days thereafter or within such further time as the Court may allow, be set down by him for hearing.
>
> (3) Upon the hearing of the case the Court shall determine the question submitted, and, if the instrument in question is in the opinion of the Court chargeable with any duty, shall assess the duty with which it is chargeable.
>
> (4) Subject to subsection (4A), if it is decided by the Court that the assessment or additional assessment of the Collector is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.

(4A) Nothing in this section shall operate to compel the Collector to refund the excess amount of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid unless the assessment has become final and conclusive in accordance with section 36D.

(5) If the assessment or additional assessment of the Collector is confirmed the Court may make an order for payment to the Collector of the costs incurred by him in relation to the appeal.

[11] In real terms, any appeal under s. 39 is always invoked by the person paying the stamp duty and not by the collector; we cannot envisage an appeal by the collector himself against his own decision – this is accepted by learned counsel for the collector. Although the notice of appeal is lodged at the High Court and thence categorised as an appeal, s. 39 provides the appealing party the right to require the collector to state and sign a case, setting forth the question upon which the opinion of the High Court was required, and the decision made by the collector. Where that right is invoked, the collector does precisely what is required under s. 39 – states the case, sets out the question upon which the court's opinion is required, and the collector's decision on that question. When the case stated is ready, a copy is sent to the appealing party and the case may then be set down for hearing by the High Court. These steps were followed in this appeal.

[12] As a case stated, the High Court is not required to hear evidence and make findings on factual evidence heard. The nature of a case stated is well-explained in the following cases and we feel it timely to remind ourselves what exactly a case stated entails despite its ancient roots. The proper appreciation of what a case stated is necessary as it then attends to the myriad of related issues as to conduct of the case stated at the High Court and more significantly, the jurisdiction of the High Court that is invoked. As we will soon see, there has been a lack of proper and due understanding of what a case stated means and entails that has, to a large extent, caused much confusion to the state of law as we now have.

[13] Interestingly, in *Lee Yee Sheng & Anor v. Commissioner of Inland Revenue* [2008] 2 HKC 436, the Court of Final Appeal, Hong Kong called on a re-look at this system or process of case stated, describing it as an "anachronism":

… The case stated procedure arose out of circumstances that have long gone. It is now easily overlooked that appeal was not a common law remedy: *Commissioner for Railways (NSW) v. Cavanough* (1935) 53 CLR 220 at 225. It is the product of statute. Under the common law, legal defects in the conduct of cases had to be remedied by the writ of error or the bill of exceptions or motions for a new trial or arrest of judgment. (*Conway v. R* (2002) 209 CLR 203 at p. 209, *Australian Iron and Steel Ltd v. Greenwood* (1962) 107 CLR 308 at pp. 315 to 317) and later by the Case Stated procedure. That procedure probably had its origins in the practice of nisi prius judges referring disputed questions of law to their brethren at

A Westminster for informal discussion and advice: see *Conway v. R* (2002) 209 CLR 203 at pp. 209 to 210. In days when tribunals and courts seldom had access to transcripts, where there were no appeals and where lay tribunals needed advice on questions of law, the Case Stated procedure no doubt served a useful purpose. But times and circumstances change. The Case Stated procedure now seems an anachronism. Certainly, it
B creates delay, takes up the time of tribunals and parties and increases the expense of conducting litigation. Often enough, dissatisfaction with the contents of the Case Stated leads to interlocutory litigation. An appeal, limited to questions of law, avoids these delays, expense and potential for interlocutory litigation. The chief downsides of an appeal, as opposed to the Case Stated procedure, are the cost of providing a transcript to the
C appellate court and the time that is often wasted by that court in determining what facts were found. However, these downsides are present in the appeal system generally. Despite their presence, an appeal, limited to questions of law, seems more likely to further the administration of justice than the Case Stated procedure.

D **[14]** That same decision of the Hong Kong Court of Final Appeal traced the principles at play in a case stated procedure, that it "should set out each fact found, in so far as it is relevant to, and necessary for, the determination of the question or questions stated"; pressing on to set out the principles as "authoritatively expounded" in a passage in the unanimous judgment of the
E High Court of Australia in *R v. Rigby* (1956) 100 CLR 146 at pp. 150 to 151.

[15] Be that as it may and until there is statutory intervention, we must get on with the understanding of the case stated procedure which is further explained by the Privy Council in *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235:

F Their Lordships cannot stress too strongly how important it is that in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded.
G Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself: occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so
H found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".

From the primary facts admitted or proved the Commissioners are entitled to draw inferences: such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' findings of a primary fact but they may be, or may involve (and very often
I do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special

> Commissioners if they can be shewn to have proceeded upon some erroneous assumption as to the relevant law. It is therefore desirable that in a Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: *viz* – whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

[16] The Federal Court in *Director-General Of Inland Revenue v. Rakyat Berjaya Sdn Bhd* [1984] 1 CLJ 219; [1984] 1 CLJ (Rep) 108; [1984] 1 MLJ 248 also explained that:

> Appeals from the decisions of the Special Commissioners in tax cases are made by way of case stated under the Income Tax Act, 1967 Schedule 5, paragraph 34. The paragraph states clearly that any appeal is on a question of law. Hence, pure findings of fact may not be challenged on an appeal. However, the court has clear and undoubted jurisdiction to reverse a decision on questions of law. The term "question of law" includes the correctness of (a) pure statements of law (*eg*, as to the correct interpretation of a statutory provision), and (b) the inferring of a conclusion from the primary facts (where the process of inference involves assumptions as the legal effect or consequences of the primary facts).

[17] The Federal Court further explained that "the power of the court to interfere is quite limited where the findings of the Special Commissioners are basically findings of facts. The court will interfere only if there is no evidence to justify the finding or where they have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have misdirected themselves in law …"

[18] Thus, when we read the Federal Court decision in *Collector Of Stamp Duties v. Ng Fah In & Ors* [1981] 1 LNS 107; [1981] 1 MLJ 288, we must do so with caution. The issue of how a case stated ought to have been conducted, the ambit of the court's jurisdiction did not arise and was thus not addressed. At p. 291, the Federal Court noted that the High Court judge had taken evidence in order to come to a decision on the value of the land which was subject to the imposition of *ad valorem* stamp duty. The High Court judgment is reported together with the judgment of the Federal Court at pp. 288 to 290 and it is quite apparent that a full-blown trial had taken place at the High Court, despite the case stated process.

[19] The courts should not be unduly troubled by this understanding of limitation on its powers when exercising its jurisdiction in a case stated. The reason why the courts do not "interfere with commissioners' findings or determinations when they really do involve nothing but questions of facts is not any supposed advantage in the commissioners having greater experience in matters of business or any other matters. The reason is simply that by the

system that has been set up the commissioners are the first tribunal to try an appeal. And in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado" – per Lord Radcliffe in *Edwards (Inspector Of Taxes) v. Bairstow* [1956] AC 14.

[20] The Federal Court in *UN Finance Bhd v. Director-General Of Inland Revenue* [1975] 1 LNS 186; [1975] 2 MLJ 224 made similar remarks to like effect:

> It may be trite to say but it will be of use to remind ourselves that an appellate court in income tax cases has only a limited function to perform. It is bound by the findings of facts by the Special Commissioners and set out in the statement of the case …

[21] Lastly, on this point of what and how a case stated is to be handled, Chan Sek Keong CJ in *Cheok Doris v. Commissioner Of Stamp Duties* [2010] SGCA 28 said:

> … the only purpose of the case stated was to facilitate the court to answer the stated questions on the basis of facts as stated. There is no burden of proof on any party as the issues to be decided are issues of law.
>
> [15] In our view, the Judge has adopted the wrong approach. Whilst his approach would have been completely justified if these proceedings had been ordinary adversarial proceedings with respect to disputed issues of fact, a case stated is a different kind of court proceedings. A case stated is an established forensic device whereby questions of law are referred to the court for determination on stated facts on the basis that the facts are true. For this reason, the circumstance that the vendor is not a party in the proceedings is not material to the case stated. If the stated facts are not sufficient to enable the court to answer the questions referred to it, then the court should direct that the case stated be amended to include the necessary additional facts for the questions to be answered. The court should not dismiss it on the ground that inadequate facts have been stated or another interested party has not been made a party to the proceedings. The case stated states an issue or issues of law between the stated parties.

[22] While the above observations were made in the context of the tax regime where the decisions of the Special Commissioners are appealed upon through the case stated mechanism, we find the principles as discussed apply equally to the appeal by case stated process stipulated under s. 39 of Act 378.

Although s. 39 talks about the collector identifying or setting forth the question upon which the opinion of the High Court is required, and the collector's decision on that question, without specifying that the question set out is a question of law, the question is necessarily one of law having regard to the case stated process. This is fortified when we turn to the other provisions in s. 39. For instance, the High Court is required to assess the duty chargeable in the event it forms the opinion that the instrument in question is chargeable with duty. Where the court opines that the assessment or additional assessment by the collector is erroneous, any excess paid shall be ordered to be repaid to the appellant – see s. 39(3) and (4).

[23] These reminders on how case stated proceedings are to be conducted, particularly the fact that the High Court is not tasked with fact finding but instead is solely required to answer what really is a question of law posed, must be well heeded and followed. Should there be any insufficiency of facts, the case stated ought to be sent back to the collector for clarification and for further gathering of evidence; it is not a trial before the High Court.

[24] The problem or confusion is compounded when the case stated is sent to the High Court. Correctly, it should have been by way of an originating motion since it only concerns a question of law. However, under the new Rules of Court 2012, the originating process of an originating motion has been deleted. Under O. 5, all originating processes are now either by writ or by originating summons. From what we see in the records before us, this case stated was lodged as an appeal. It is this manner in which the appeal was lodged at the High Court that, in our respectful view, is the cause of the misconception that the matter before the court was a full appeal, and not a limited appeal by case stated on a question of law for the High Court's determination.

[25] The jurisdiction and powers of the High Court are as provided under art. 121 of the Federal Constitution, that is, "as may be conferred by or under federal law". Amongst the 'federal law' enacted to confer jurisdiction and power on the courts are the Courts of Judicature Act 1964 (Act 91) and for the purpose of this appeal, the Stamp Act 1949 (Act 378). Part II of the Courts of Judicature Act 1964 (Act 91), specifically ss. 23, 24, 27 to 29 and even more specifically, s. 27, provides for the appellate jurisdiction of the High Court but it is only in relation to hearing appeals from subordinate courts:

> **27. Appellate civil jurisdiction**
>
> The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided.

[26] The jurisdiction of the High Court to hear appeals from tribunals or statutory bodies are to be found in the relevant laws; in this case, in s. 39 of Act 378. The procedure involved is set out in O. 55A of the Rules of Court 2012 and O. 55A r. 1 provides that the appeal to the High Court is by way of an originating summons:

> **Appeals to the High Court under written law (O. 55A r. 1)**
>
> (1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by way of an originating summons setting out the grounds of the appeal and supported by an affidavit, and if the Court so directs at the hearing of the appeal, by way of oral evidence.

[27] This originating mode is consistent with s. 29 of the Courts of Judicature Act 1964 (Act 91) which provides that "all civil appeals from a subordinate court shall be by way of rehearing"; guided of course, by the principles of appellate intervention as established through caselaw.

[28] However, this is not the position for appeal by way of a case stated procedure. As elaborated earlier, the case stated procedure does not involve the High Court making any inquiry as to facts. The facts would be as found by the collector and as stated. The High Court's sole function in a case stated is to answer the question(s) posed. That being so, the case stated from the collector under s. 39 ought to have been filed at the High Court by way of an originating summons. Unfortunately, and as pointed out earlier, it was not so filed, lending to the state of confusion insofar as the matter of what jurisdiction of the High Court has been invoked when dealing with the question of law posed in the case stated. Although the case stated was filed as an appeal; this does not alter the true nature of proceedings before the High Court.

[29] It is the failure to understand what a case stated is that has led to the misunderstanding of the particular jurisdiction under which the High Court is exercising when hearing a case stated. While there is a right of appeal, it is a limited right of appeal. It is limited by statute in that only a question or issue may be sent to the High Court for determination.

[30] Although the word "appeal" is used in s. 39, it is "loosely called an appeal" as described by the Federal Court of Australia in *Committee of Direction of Fruit Marketing v. Australian Postal Commission* [1979] 25 ALR 221 in relation to that same word appearing in s. 44 of the Administrative Appeals Tribunal Act 1975. Section 44 provided for a right of appeal from the Administrative Appeals Tribunal to the Federal Court of Australia on a question of law; yet the Federal Court there was clear in its conclusion that the appeal invoked the original and not appellate jurisdiction of the court.

[31] In our instant case, the position is on even firmer ground when the word "appeal" is read and understood in the full context of s. 39, where not only is the mode of case stated specified, the question or issue has to be identified, and the collector's decision on the issue or question set out. What appears to be grossly overlooked is that it is the opinion of the High Court on the issue or question identified in the case stated that is required. Nothing else. The High Court is not asked to invoke its appellate powers in determining the question or issue identified for if that was the position, the High Court is entitled to rehear the whole case including the evidence before deciding whether it ought to interfere in findings and any conclusions reached by the collector. That would be consistent with the court's appellate powers under ss. 27 and 29 of the Courts of Judicature Act 1964 (Act 91) read with O. 55A of the Rules of Court 2012. But, as we have seen, the case stated procedure does not contemplate the use of such powers.

[32] The case stated here was posed to determine the question of:

> Sama ada duti setem ke atas Memorandum Pindahmilik (Borang 14A) tersebut hendaklah ditaksir di bawah peruntukan item 32(e) atau item 66(c) Jadual Pertama, Akta Setem 1949.

[33] When the High Court hears this case stated, it only answers that question as posed. While the High Court is empowered to make orders and vary the sums already ordered by the collector, the High Court does so in exercise of its original jurisdiction. It does not sit in appeal.

[34] The case stated type of appeal under s. 39, in substance, does not invoke the appellate jurisdiction of the High Court. In effect, it falls within the second type of statutes as described in *Merck KGaA v. Leno Marketing (M) Sdn Bhd; Registrar Of Trade Marks (Interested Party)* [2018] 6 CLJ 167; [2018] 5 MLJ 1:

> [21] The starting point in determining the appellate jurisdiction of the Federal Court is the Federal Court. Article 121(2)(a) provides that …
>
> [22] Article 121(2)(a) does not confer an unlimited right of appeal to the Federal Court. The general empowering provision in art. 121(2)(a) must be read *in tandem* with art. 128(3) …
>
> [23] The balance between ensuring justice and finality in litigation has been struck by Parliament in federal laws for the establishment of various tribunals, with a spectrum of different provisions for challenging the tribunals' decisions. For ease of exposition, in considering whether an appeal lies to the Federal Court, the laws relating to tribunals can be broadly categorised into three types.
>
> [24] The first type consists of statutes which expressly provide the right of appeal from the decision of the tribunal to the High Court, the Court of Appeal and the Federal Court. One example is the Legal Profession

A Act 1976. Section 103E(1) allows any party aggrieved by the decision of the Disciplinary Board to appeal to the High Court, and section 103E(5) goes on to provide that 'any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court'.

[25] For the purposes of art. 128(3), statutes of the first type are 'federal
B law' which provide for the appellate jurisdiction of the Federal Court. Where such statutes apply, s. 96 of the CJA is of no application, and an appeal lies to the Federal Court as of right subject to the terms of the statute.

[26] The second type consists of statutes which provide for recourse to the High Court against the decision of the tribunal, but is silent on
C whether any further appeal lies to the Federal Court. The recourse to the High Court may be framed in various ways, for instance by way of case stated, application, or appeal. The Sabah Land Ordinance (Cap 68) is an example: s. 41 thereof states that an appeal shall lie from the decision of the Director of Lands and Surveys to the High Court.

D [27] In respect of statutes of the second type, the relevant federal law which determines whether a subsequent appeal lies to the Federal Court is s. 96(a) of the CJA. For the Federal Court to be seized of jurisdiction to hear the appeal, as will be elaborated below, one of the conditions under s. 96(a) is that the cause or matter was decided by the High Court in the exercise of its original jurisdiction.

E

[28] The third type consists of statutes which do not expressly provide for any right of appeal to the Court against the decision of the tribunal. One such example is the Consumer Protection Act 1999, which does not make provision for an appeal against an award made by the Tribunal for Consumer Claims.

F

[29] In relation to statutes of the third type, since the right of appeal is not inherent but a creature of statute, no appeal lies to the Court (*Kulasingam v. Public Prosecutor* [1978] 2 MLJ 243 at p. 244; *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 2 MLJ 549 at p. 553). However, the High Court has an inherent supervisory jurisdiction over the proceedings and
G decisions of inferior courts, tribunals or other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties (*R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p. 191; *Ahmad Jefri bun Mohd Jahri @ MDHS Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [201] 3 MLJ 145 at para. [6]).

H [30] For decisions made by tribunals under the third type of statutes, the recourse for the aggrieved party is to invoke the supervisory jurisdiction of the High Court and challenge the decision of the tribunal by way of judicial review. Given that the supervisory jurisdiction of the High Court has been held to be a form or original jurisdiction (*Tan Sri Eric Chia Eng Hock v. Public Prosecutor (No 1)* [2007] 2 MLJ 101 at para. [10]), the condition
I in s. 96(a) of the CJA is met, and the aggrieved party may subsequently bring an appeal to the Federal Court.

> [31] The TMA, in particular s. 28 thereof, falls within the second type described above. Our decision on question 1 concerns the application of the test in s. 96(a) of the CJA to statutes of the second type.

[35] In applying the settled principles on the test under s. 96(a) of the Courts of Judicature Act 1964 (Act 91), the Federal Court in *Merck KGaA* found the third condition, that is, that the High Court must have decided the cause or matter 'in the exercise of its original jurisdiction', not met. In the course of its deliberations, the Federal Court disagreed with the approach advanced in *Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang Malaysia (Interested Party)* [2011] 7 CLJ 401, where the focus was on the status of the tribunal, finding such focus 'misplaced', and that the approach was 'expressly discountenanced' in *Tio Chee Hing v. United Overseas Bank (Malaysia) Bhd* [2013] 2 CLJ 910; [2013] 3 MLJ 212. The Federal Court preferred instead the approach taken in *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No: 08-31 of 1999), an unreported decision of this court but cited with approval by the Federal Court in *Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241; [2011] 2 MLJ 433, and also *Merck KGaA*.

[36] In *Yong Teng Hing*, the Federal Court had held that since the status of the Registrar of Trade Marks cannot be equated to an inferior court whose decisions are appealable to the High Court under s. 27 of the Courts of Judicature Act 1964 (Act 91), the High Court was in fact exercising original jurisdiction. Whereas in *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd*, Chong Siew Fai CJSS opined that the "pertinent question to consider is not so much as to whether the Special Commissioners constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated." The issue in *Jasa Bumi* was whether in making a decision on a case stated by the Special Commissioners of Income Tax, was the High Court exercising its appellate or original jurisdiction. According to the Federal Court in *Koperasi Jimat Cermat* at p. 248 (CJL); p. 439 (MLJ), the Federal Court in *Jasa Bumi* held:

> [11] After having considered art. 128(3) of the Federal Constitution, s. 96(a) of the CJA and the relevant provisions of the Income Tax Act 1967, the Federal Court came to the conclusion that the decision of the High Court was made in the exercise of its appellate jurisdiction and as such it does not come within the ambit of s. 96(a) of the CJA and, therefore, the decision of the Court of Appeal respecting which leave was sought is not appealable to the Federal Court.

[37] We do not propose neither do we feel the need to enter into any deliberations on these decisions since there is more than sufficient discourse on *Yong Teng Hing* in *Tio Chee Hing* and *Merck KGaA*. In any case, the statute under consideration in *Yong Teng Hing* was the Trade Marks Act 1976 where the appeal to the High Court was not by a case stated.

[38] Similarly, *Koperasi Jimat Cermat* and *Tio Chee Hing* are clearly distinguishable in that the right of appeal respectively under s. 83(7) of the Co-operative Societies Act 1993, and s. 41 of the Sabah Land Ordinance (Cap 68) were by full-blown appeals and not, by way of case stated. The High Court in those two cases were clearly sitting in their appellate and not original jurisdiction in which case, the matters ended at the Court of Appeal. This was similarly so in *Merck KGaA* where the High Court was hearing an appeal against the decision of the Registrar of Trade Marks under s. 28 of the Trade Marks Act 1976. See too the well reasoned decision of this court on this issue in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721.

[39] As for the decision in *Jasa Bumi*, we do not have benefit of the grounds as it remains unreported. We note that paras. 34 to 42 of Schedule 5 to the Income Tax Act 1967 contain elaborate provisions on the appeal process to the High Court. In particular para. 41 states that the "There shall be such rights of appeal from decisions of the High Court on an appeal under para. 34 as exist in respect of decisions of the High Court on questions of law in its appellate civil jurisdiction". However, para. 42 does make reference to appeals to the Federal Court and it is unclear if these provisions were examined by the Federal Court in *Jasa Bumi*. Other than these observations, we do not think it proper for us to express any view on the ambit and scope of the case stated procedure under the Income Tax Act, a statute which is not under consideration in this application or appeal.

[40] Consequently, the case stated in this appeal is indeed, appealable to this court, and this court is vested with jurisdiction to hear this appeal after leave was granted on the questions posed.

[41] For all the reasons stated we dismiss the application in 08(R)-2-02-2022(B) and affirm the decision of this court in granting the said leave questions.